Nos. 22541 A-G, 22574, 22575, 22576 A-L,
22577A, 22578 A-C

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN PIPE AND CONSTRUCTION CO.,

Appellant,

vs.

THE STATE OF CALIFORNIA, *et al.*,

Appellees.

On Appeal From the United States District Courts for The: Northern District of California, Central District of California, Southern District of California, Western District of Washington, and District of Oregon.

BRIEF FOR THE APPELLANT.

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three "trial judges" would make substantive rulings affecting all of the trials (App. pp. 121-122).[1]

The District Courts had jurisdiction pursuant to 15 U.S.C. §15. Notices of Appeal in these cases were filed by appellant on December 26, 1967. On February 5, 1968, this Court filed its order consolidating these cases "for hearing under one record for the purpose of briefing, argument if called for, and submission." On the same day, this Court filed its order that "this proceeding shall be considered in the nature of mandamus" and that "respondents' motion to dismiss . . . shall be and is passed for consideration until the proceedings are submitted on the merits . . .".

This Court has jurisdiction to review the order appealed from under both 28 U.S.C. §1291 and the All Writs Act, 28 U.S.C. §1651(a).[2]

Beginning in 1964, separate treble damage antitrust cases were filed in five Districts by some 150 plaintiffs (most of which are states, municipalities and other public agencies) asserting claims against appel-

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[1]In view of the accelerated briefing schedule established by this Court in these matters, the entire record on appeal has not been filed with the clerk of this Court in accordance with the provisions of Rule 10. For the convenience of the Court, appellant has prepared and files herewith an appendix to this brief containing all of the documents from the courts below which it considers relevant to the issues involved in these appeals. References to this appendix are stated thusly: "App. pp. .....".

[2]On October 30, 1967, to seek review of an earlier order similar in form, but different in dates fixed for its execution, appellant filed with this Court a motion for leave to file a petition for a writ of mandamus (No. 22336), and after denial of this motion by this Court on December 1, 1967, subsequently, on December 26, 1967, filed an application for reconsideration which was denied by this Court on January 9, 1968. For this reason occasional reference may be made to Case No. 22336.

lant American Pipe and Construction Co. and others.[3] The complaints, all of which were substantially identical in form, charged that the defendants had violated Section 1 of the Sherman Act (15 U.S.C. §1) by allocating and dividing orders and territories, and submitting "collusive and rigged bids" for the sale of concrete and steel pipe (See, for example, App. 1-13).

Appellees contend that there was a single conspiracy which encompassed a ten state area—California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii. American vigorously denies that it participated in any conspiracy, but, assuming *arguendo* the existence of a conspiracy, asserts that there were separate arrangements involving differing areas, times, products and parties (App. pp. 190-198).

Since the early stages of this multiple litigation all of the cases were channeled by the Chief Judge of this Court and by the Chief Judges of the various districts involved to Judge Martin Pence, Chief Judge, District of Hawaii. The four government cases (not involved in these appeals), were filed on June 23, 1964 in the Central District (formerly Southern District, Central Division) of California. They were consolidated with other cases (not involved in these appeals) on July 20, 1964. On December 9, 1964, Judge Pence was designated by the Chief Judge of this Court to sit in the Southern District (now Central District) of California. On December 18, 1964, the cases referred to above

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[3]All of the other defendants—United States Steel Corp., Kaiser Steel Corp., United Concrete Pipe Corp., Martin-Marietta Corporation, and U.S. Industries, Inc.—settled out of court with the plaintiffs shortly after the court below first announced that it intended to order simultaneous trials.

were transferred by Judge Westover of that District to Judge Pence for all further proceedings therein. Shortly thereafter, some of the cases below were filed in the Northern District of California. On December 9, 1964, the Chief Judge of this Court designated Judge Pence to sit in the Northern District of California and, on December 15, 1964, the cases pending there were assigned by the Chief Judge of that District to Judge Pence "for all further proceedings." Later, as cases were filed in the Western District of Washington and the District of Oregon, Judge Pence was designated by the Chief Judge of this Court to sit in those Districts and almost simultaneously the Chief Judges of those Districts assigned the cases there pending to Judge Pence (App. pp. 22-32). Judge Pence began the task of assuming the responsibility for "all Western Concrete and Steel Pipe Antitrust Cases" early in 1965. In his letter dated February 19, 1965, to "all counsel", he stated

> "* * * it appears to this Court that a great amount of the discovery aimed at developing the defendants' alleged conspiracies is overlapping, intertwined, has relevancy to almost all actions, and wherever this is true, should be conducted by and on behalf of all plaintiffs and defendants at one and the same time. * * *." (App. pp. 241-243).

Judge Pence followed this letter by conducting pre-trial conferences on March 11 and 12 and on May 27 and 28, 1965, culminating in Pre-Trial Order No. 1 (App. pp. 33-58).

Since February 19, 1965, Judge Pence has closely supervised and coordinated all proceedings in the Pipe Cases. Although Pre-Trial Order No. 1 expressly purported not to consolidate the cases "for trial or for any

purpose", pre-trial discovery procedures were ordered and carried out on a joint basis from the very beginning of Judge Pence's assignment to the cases. Previous interrogatories, motions for the production of documents and notices of depositions filed by any party were ordered withdrawn. Motions, and briefs thereof, directed to the complaints in the various actions were ordered filed on single dates specified and counsel were requested "insofar as feasible * * * to unite in common briefs * * *". A schedule of discovery was ordered. A joint motion by plaintiffs for production, joint interrogatories by plaintiffs to defendants, joint "transaction" interrogatories by defendants to plaintiffs, joint production by defendants, and many other joint activities (as to plaintiffs on the one hand and as to defendants on the other) were ordered by Judge Pence. Pleadings, motions, briefs, notices, orders and other documents "applicable to all of the causes" were prepared as one single paper "made applicable to all of the causes" and as to each separate District carried only "the file cause name and number of the lowest numbered" of the causes there (App. p. 35).

Depositions were ordered taken by plaintiffs and by defendants on a joint basis. This order was carried out by plaintiffs and, until appellant remained as the sole defendant, by defendants. A joint trial brief has been filed by plaintffs and, except as to plaintiff Washington Public Power Supply System, all plaintiffs have joined together in a single "compact" employing a single firm of attorneys as special counsel, jointly paying all expenses of litigation and jointly agreeing to divide the proceeds of all of the cases regardless of the outcome of any single case (App. pp. 97-113).

When the subject of trial settings first arose, counsel for appellees suggested the selection of four "bellwether cases" to be tried in sequence. In October, 1966, Judge Pence established a tentative trial plan which contemplated four trials with reasonable respites of from 60 to 90 days between each one.

The first suggestion for three simultaneous trials is found in Judge Pence's letter dated November 28, 1966, in which he states:

> "Mr. Cooper [Judge Pence's administrative assistant] has written you concerning the proposed agenda for the December 14 conference. The possible revision that I am considering is that of scheduling all discovery in *all* cases to be carried on simultaneously and then holding practically simultaneous trials in Seattle—with Judge Boldt sitting —San Francisco—with Judge Zirpoli sitting, and in Los Angeles—with myself sitting—sometime around October 1967. If this procedure is followed, it is anticipated that all cases will be ready for trial at the same time, so that if any are settled out prior to trial, other cases will be substituted for trial in their place." (App. p. 244).

This was followed by a discussion of the matter at the pre-trial conference on December 14, 1966. American protested and Judge Pence reserved his decision. At a pre-trial conference on February 3, 1967, appellees' counsel urged the trial court to order simultaneous trials before separate judges. American again pointed out the inequities of such a plan, but suggested the possible consolidation of all cases for a single trial.[4] Ap-

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[4]By this time all other defendants had settled and American's counsel was confronted by a battery of at least 20 groups of counsel representing plaintiffs.

pellees did not then and never have advanced a single sensible argument which would indicate the desirability of simultaneous trials. So also, appellees rejected the concept of a single trial which, of course, would conserve the time and expense of the litigants and the courts (App. pp. 269-278).

On February 21, 1967, the trial court entered Pre-Trial Order No. 9 which, except as to dates of execution, is the same as the order under review. However, on June 12, 1967, Judge Pence indicated that he might reconsider that portion of the order which required simultaneous trials and requested the parties to submit their views. He stated "Three fires might be enough or I might not use but one." (App. p. 267). Appellees recommended consolidation so as to permit the litigation to be tried in *seven* separate trials but with *three* simultaneous trials to be followed by *three* more simultaneously and finally followed by the remaining (seventh) trial before Judge Pence. Once again no real reasons were advanced in support of these proposals. American suggested two alternatives, (a) consolidation of the claims so as to permit three trials *in sequence* before Judge Pence, or (b) a single consolidated jury trial on the issue of liability before Judge Pence to be followed, if necessary, by a trial before Judge Pence without a jury on the question of damages (App. pp. 77-96). Either proposal of appellant would have resulted in economies of time and would have obviated the prejudice which will flow from simultaneous trials. Appellees rejected these proposals even though every plaintiff in every case is claiming that it was injured as the result of a single conspiracy.

On October 11, 1967, the trial court entered Pre-Trial Order No. 12, which, once again, provided for three or more simultaneous trials before three judges and, on October 30, 1967, American filed a motion for leave to file a petition for a writ of mandamus. While this motion was pending, the trial court (on November 27, 1967) filed Pre-Trial Order No. 14. The portion of said order from which these appeals are taken reads as follows:

> "S. A pre-trial conference is set for February 21, 1968, at 9:30 a.m. in San Francisco,[5] at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonzo Zirpoli (N.D. Calif.) and/or such other judges as may be designated, will preside. At such time the trial judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district, and (d) determine whether other cases pending in any such district should be consolidated for trial. At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time as the presiding judge shall determine, but in no event later than March 18, 1968. Among other things, the following matters will be considered:
>
> (1) The voir dire examination;
>
> (2) The form of a summary to be read to the jury to explain the contentions of the parties and the issues;

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[5]On January 12, 1968, the date for this particular pre-trial conference was postponed to some date in the near future to be established by Judge Pence.

(3) The number of jury challenges permitted, the number of alternate jurors to be impaneled. and the necessity that a verdict be returned by a jury of twelve;

(4) Jury instructions and special interrogatories;

(5) Counsel's opening statements;

(6) The days and hours of the week during which Court will be conducted;

(7) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;

(8) Daily trial transcripts;

(9) A current index of the trial record;

(10) The handling of documentary evidence at trial;

(11) The scope of testimony of witnesses to be called at trial and possible limiations with respect thereto;

(12) The use of depositions, including the possible use of narrative summaries or verbatim extracts;

(13) The parties' report on their attempts to stipulate as to facts;

(14) Further pre-trial proceedings;

(15) Rulings on objections to designated deposition testimony and documentary evidence, where possible;

(16) Possibility of settlement." (App. pp. 121-122).

On December 26, 1967, notices of appeal from the above order were filed in each of these cases in each of the Districts involved.

When it came time to file appellant's trial brief below under the order appealed from, appellant wrote to Judge Pence as follows:

> "Since the filing of such Notice of Appeal passes the jurisdiction in these cases from the district courts to the Court of Appeals and the district courts have no further jurisdiction, it would be abortive for Defendant American to file its Pre-Trial Brief on the due date, December 31, 1967. See *Jarva v. United States* CA9, (1960) 280 F. 2d 892, 894; *Resnik v. La Paz Guest Ranch*, CA9, (1961) 289 F. 2d 814, 818.
>
> We wish to assure your Honor and all counsel for plaintiffs who will receive a copy of this letter that this appeal has not been taken for purposes of delay. Accordingly, we are transmitting herewith (and to all counsel for plaintiffs) copies of Defendant American's Pre-Trial Brief, but we are not formally serving or filing it at this time." (App. p. 222).

Appellees filed a brief asserting that the order was not appealable and appellant responded (App. pp. 223-240).

On January 12, 1968, the trial court decided that the appeals were a nullity and that, consequently, it retained jurisdiction to enter further orders on the merits (App. pp. 314-319). On January 26, 1968, appellant filed its motion in this Court for a stay of proceedings below pending appeal.[6] On appellant's motion, a temporary stay was entered on January 29, 1968 and a hearing was set for February 5, 1968 on appellant's motion for

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[6]Appellant also moved for consolidation of the appeals and said motion was granted on February 5, 1968.

a stay pending appeal. In response, appellees, among other things, moved to dismiss these appeals. This Court entered a modified stay, passed appellees' motion for consideration until the proceedings are submitted on the merits and ordered that this proceeding "shall be considered in the nature of mandamus."[7]

Issues Presented.

A. Whether Deliberately Planned Simultaneous Trials of Three or More Complex Cases Would Deny Appellant a Fair Trial?

B. Whether, in Multi-District Litigation, a Trial Court Can Order Simultaneous Trials Over the Objections of the Sole Defendant?

C. Whether a Trial Court Can Empanel a Special Multi-Judge Court to Make in Advance of Trial Substantive Rulings Which Will Affect the Outcome of the Trials of Many Cases?

D. Whether the Challenged Order Is Appealable?

Specification of Error.

The trial court erred in entering Paragraph 5S of Pre-Trial Order No. 14.

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[7]This Court entertained extensive oral argument directed to appellees' claims that the appeals were untimely and were interposed for purpose of delay. In view of the February 5th order, American does not propose to burden the Court with further argument on the technical and procedural points raised by appellees. Accelerated briefing and a limited stay provision were affirmatively suggested by American.

ARGUMENT.

I.

The Deliberately Planned Simultaneous Trials of Three or More Complex Cases Will Deny American a Fair Trial.

All parties agree that the pending cases are closely related and involve complex facts. Each appellee claims that it was victimized by the same single conspiracy and each is claiming monetary damages. Recognizing that the cases were closely related, the Chief Judge of this Court and the Chief Judges of the Districts below, issued orders which assigned all of the cases to Judge Pence "for all further proceedings therein." None of the parties objected to this procedure and all cooperated with Judge Pence in the joint pre-trial procedures ordered by him. After taking charge of the cases, Judge Pence charted a course of pre-trial discovery which was designed to have all cases ready to be tried at or about the same time because of the possibility that some of the cases would be settled and, if this happened, the remaining cases would be ready for trial.

If these 27 cases had been handled separately, within each of the five separate Districts, each would have had its separate pre-trial procedures and each would have reached the trial stage in its own separate fashion. Separate arrangements would have been made for the prosecution and the defense of each. If, *coincidentally*, all had proceeded to trial simultaneously, appellant would not be in this Court seeking relief. But that is not what happened here. This Circuit had a better plan which called for the assignment of one judge, one unified prosecution and one unified defense. After three years of this unified, joint effort, appel-

lant finds itself threatened with dismemberment—forced to proceed on three fronts rather than one. Assuming that the trial court had the power to deliberately plan and issue such an order, was it an abuse of discretion? Will it handicap American in presenting a meaningful defense? Does the zeal for *administration* of justice stand to interfere with justice itself? These are some of the many serious problems presented by this appeal.

The record clearly establishes that the sites of the three simultaneous trials will be Seattle, San Francisco and Los Angeles (App. p. 244). This is of importance to an understanding of the following very real problems which confront American:

(a) American selected trial counsel in reliance upon the orders transferring these cases to Judge Pence for all further proceedings therein and in the reasonable expectation that there would be separate seriatim trials, with or without some consolidation of trials. Thus, it is manifestly unfair to deliberately create a three-front war—especially where the appellees are allied in a common cause and there is no rational need for such an unorthodox procedure.[8] Now, counsel for appellant would be obliged to set up three separate trial staffs and for each of the trials prepare separately to meet the

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[8]About six months ago all of the appellees (except Washington Public Power Supply System) joined in a "Compact" in which they agreed not to accept individual settlements absent approval of a committee. In addition, under the terms of the Compact, it is difficult—if not impossible—for the members to withdraw any funds realized from any judgments until all of the cases have been settled or tried. Furthermore, all plaintiffs will share in any amount realized, whether they win, lose, or draw on their individual case (App. pp. 97-113). Although American is not challenging this agreement on this appeal, it goes far to explain appellees' demand for simultaneous trials.

oral testimony and documentary evidence offered by plaintiffs in each area. Since plaintiffs claim "a single unitary plan or agreement entered into by the executive officers of the defendant together with agents employed by the former defendants and others * * * a single plan, agreement or conspiracy" (App. p. 213) constant collaboration between the three separate staffs of appellant would be required throughout the three separate simultaneous trials. While one staff would be preparing to meet the day to day problems which arise throughout the trial by consultation with company executives and employees, reference to company records and the like in Los Angeles, staffs in the other two cities might well find themselves confronted with the same problems at the same time and, of course, handicapped by the preoccupation of the staff in Los Angeles with the same executives and employees and the same records.[9]

(b) American's counsel would be unduly handicapped at trial in that they could not have knowledgeable persons present at each of the various trials to supply information which would be helpful in cross-examining appellees' witnesses. In their pre-trial brief below, appellees plainly indicate that they propose to rely on the testimony of the same witnesses and upon the same documentary evidence to establish the alleged conspiracy at each of the separate trials. Much of the oral testimony, appellees indicate, will be in the form of depositions of witnesses previously taken at the instance of appellees. While appellees are offering in Seattle the deposition of witness Jones with all of the related docu-

[9]In contrast, appellees are equipped with twenty or more separate staffs of counsel each representing separate appellees in separate areas and are therefore peculiarly equipped to meet such problems with much greater ease.

ments, plaintiffs in Los Angeles and San Francisco may be offering the same. No amount of preparation prior to trial could ever resolve the day to day problems simultaneously confronting counsel in Seattle and counsel in the other two cities. Parenthetically it should be observed that the situation becomes even more complicated when one realizes that the trial court in Seattle might admit or reject evidence at the same time that the trial courts in the other cities are making contrary rulings with regard to the same evidence.

(c) American selected a single economic expert who, for many months, has studied a mass of computer runs relating to appellees' damage claims. It is essential to American's defense that this expert be present at each trial to hear appellees' evidence relating to damages claimed; to supply requisite information for an informed cross-examination of appellees' battery of experts; and to testify concerning the economic issues involved in appellees' damage claims. Quite obviously, in this respect alone, the order would so severely prejudice American as to deny its fundamental right to a fair trial.

(d) American's witnesses can only attend one trial at a time. Consequently, if the trials proceed simultaneously and approximately at the same pace, American would have to risk the wrath of the trial judges and more importantly, the juries by requesting frequent continuances. Even if American could count on the fact that requests for continuances would be granted, it would still be forced to defend the cases in mid-air. Meaning, counsel and the witnesses would have to depend upon jets and waiting rooms to confer regarding developments in each case. This problem has yet another aspect because one of American's officers

is a defendant in three of the pending cases. Certainly he should be entitled to attend the cases in which he has a personal stake.

(e) The simultaneous trials will cause practically insurmountable problems and substantial and unnecessary expense. To illustrate, because of the enormous number of documents involved, the trial court established a central document depository in Los Angeles containing all of the documents produced by all defendants, totaling hundreds of thousands of pages, most, if not all, of which have been designated by appellees for use at the trials (App. pp. 48-49). Obviously the depository cannot be in three places at one time. Even if the parties could agree on a stipulation which would permit the use of copies in lieu of original documents, American would be required to reproduce many copies of hundreds of thousands of exhibits.

These are but some of the many ways in which American will be prejudiced. American is justifiably fearful that separate records in the simultaneous trials might not clearly reflect that prejudice for eventual appellate review. What is the compelling need for such an order? No good reason has ever been advanced and we challenge appellees to advance one. Will it save trial time? Indeed, it will not. It may save some time on the calendar, but it will unnecessarily multiply the trial days. If prompt adjudication of the claims is said to be the reason, it is a feeble excuse since American has offered to submit to a single speedy consolidated trial and this offer was rejected out of hand. Thus, we are forced to the conclusion that this order under the guise of judicial administration is in reality a weapon designed to force American to settle the cases.

II.

Fundamental Justice Requires That This Related and Complex Litigation Be Conducted in a Manner Which Will Not Prejudice Appellant.

A. Multi-District Claims Can Only Be Consolidated for Trial if Consolidation Will Not Be Prejudicial.

Absent consent of the parties, actions pending in different districts may not be consolidated but, of course, the possibility of consolidation may persuade a court to transfer an action to another district where a related case is pending. Barron and Holtzoff, *Federal Practice and Procedure,* Vol. 2B, p. 178.

American does not and has not opposed consolidation —even consolidation which transcends district boundaries. It has merely insisted that it would be improper under Rule 42(a), F.R.C.P., to enter a consolidation order which, as here, would prejudice it. *Mays v. Liberty Mutual Insurance Co.,* 35 F.R.D. 234 (E.D. Pa. 1964); *American Photocopy Equipment Co. v. Fair Inc.,* 35 F.R.D. 236 (N.D. Ill. 1963); *Bascom Launder Corp. v. Telecoin Corp.,* 15 F.R.D. 277 (S.D. N.Y. 1953).

Appellees have never opposed partial consolidation. Indeed, they have affirmatively urged that the 27 cases be reduced to 7. If partial consolidation would not prejudice appellees, how could complete consolidation for trial purposes cause them harm—especially since they all rely upon a single alleged conspiracy? Under the circumstances, it is incumbent upon the trial court to devise a plan of partial or complete consolidation which will not cause prejudice or else allow the cases to be tried separately.

B. A Litigant Is Entitled to Have the Trial Judge Make Rulings on Fundamental Issues.

Although these cases were transferred to Judge Pence for all purposes and he is intimately familiar with the issues, Pre-Trial Order No. 14 specifies that a panel of three judges "will preside" at a pre-trial conference to be held on the eve of trial and consider, *inter alia,* jury instructions, special interrogatories, possible limitations on the scope of testimony, the use of depositions and rulings on objections to designated deposition testimony and documentary evidence.

This, then, is not to be an informal conference of judges to discuss problems of mutual concern. Instead, the order contemplates that this unorthodox panel will make substantive rulings which will have a direct effect on the outcome of all the trials. Article III, Section 1 of the Constitution vests in Congress the sole power to create "inferior courts" and the District Court system is established by 28 U.S.C. §81, *et seq.* The Chief Judge of this Circuit may designate district judges to sit in any district within the Circuit (28 U.S.C. §292(b)) and the Chief Judge of the district may assign a judge within his district to sit on certain cases (28 U.S.C. §137). Such powers, however, do not permit the convening of special district courts. Congress has provided for specially constituted district courts for extrordinary circumstances and their jurisdiction is strictly limited by statute. 28 U.S.C. §§1253, 2281, 2282, 2284 and 2325. Hence, the special panel called by Judge Pence is without authority to act. Moreover, Judge Boldt, one of the prospective members of the panel, has heretofore assigned all of the *Pipe Cases* pending in his District to Judge Pence (App. p.

27). Finally, F.R.C.P. Rule 77(b), in pertinent part, provides: ". . . no hearing . . . shall be conducted outside the district without the consent of all parties affected thereby."

When, as here, a judge is designated and assigned to handle certain cases he is required, during the period of the designation, to discharge "all judicial duties for which he is designated and assigned." 28 U.S.C. §296. Any orders which interfere with such a designation or conflicting orders of assignment are reviewable. *Johnson v. Manhattan Ry. Co.*, 61 F. 2d 934 (2nd Cir. 1932), *affirmed*, 289 U.S. 479 (1933).

Appellant does not claim that it has the vested right to have Judge Pence sit on each of the cases.[10] However it does contend that it is entitled to have vital rulings made by the trial judge and not by a committee.

III.

The Order Below Is a Final Appealable Order.

Although the February 5, 1968, Order of this Court established that these appeals "shall be considered in the nature of mandamus," American respectfully maintains that the challenged order is also appealable under the "collateral order" doctrine.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) was the first in a series of cases wherein the Supreme Court spelled out in detail the circum-

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[10]However, appellant does assert that the original assignment to Judge Pence for "all purposes" was in the best interests of judicial administration and that the last minute assignment of other judges is not. *Protracted Cases—Recommended Procedures* 25 F.R.D. 377; *Outline of Suggested Procedures, and Materials For Pre-Trial and Trial of Complex and Multiple Litigations*, p. 14.

stances meriting prompt appellate review of collateral orders which do not merge in or terminate an action.

Subsequently, in *Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964) the Supreme Court went one step further. In *Gillespie,* the District Court had granted defendant's motion to strike certain allegations from the complaint in a wrongful death action, including damage claims for pain and suffering asserted under the Jones Act and other recovery rights advanced on behalf of the brother and sisters of the decedent who were not parties to the action. The stricken claims *were* clearly *ingredients* of the cause of action and, hence, *would merge* in the final judgment and be reviewable at the termination of the litigation. Nevertheless, the Sixth Circuit afforded appellate review, and the Supreme Court affirmed, finding that the "delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them. * * *" (379 U.S. at 153). Moreover, since the ruling was "*fundamental* to the further conduct of the case," immediate review was warranted then and there. *Id.* at 153-54.

The *importance* of the issue to the pending case was the basis of the finding of finality in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). There, Brown Shoe appealed under Section 2 of the Expediting Act from a judgment requiring dissolution but which left open the plan of divestiture. The Court stated (p. 306):

> "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy and inexpensive determination of every action': the touchstone of federal procedure."

Commentators have recognized that

> ". . . where substantial rights are determined by an interlocutory order or where protracted and costly proceedings are dependent upon these orders, postponing review until there has been a final adjudication works an undue hardship on the litigants."[11]

In a case pending in this Court (*Shell Oil Company v. Jones, et al.* No. 22441), appellant noticed an appeal from an order entered under Rule 30(b) of the Federal Rules of Civil Procedure sealing depositions in a treble damage antitrust case. Four days thereafter, appellees moved to docket the appeal and to dismiss the same. The Court has entered an order passing consideration of the motion to dismiss to the hearing of the case on the merits. In any event, the appeals in the *Jones* case and the instant appeals raise important questions regarding the applicability of the collateral order doctrine to fundamental rulings which, as far as appellant can ascertain, have never been determined by this Court. In order to avoid undue repetition, appellant will not burden the Court with the further citations with respect to the applicability of the collateral order doctrine, but refers the Court to appellant's memorandum in support of its motion for a stay of proceedings.

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[11] *Requiem For the Final Judgment Rule,* 45 Texas L. Rev. 292, 293. See also *Appealability In the Federal Courts,* 75 Harv. L. Rev. 351.

IV.

In Any Event This Court Should Adhere to Its Decision to Treat the Appeals as a Mandamus Proceeding and Should Take Corrective Action.

Although American contends that the order below is appealable, if the Court finds that the appeals are improvident, it can and should still review the order by treating the appeals—as it has—in the nature of a mandamus proceeding. *Maricopa Tallow Works, Inc. v. U.S.,* 1968 Trade Cases ¶72,346 (9th Cir. 1967); *Olympic Refining Co. v. Carter,* 332 F. 2d 260 (9th Cir. 1964) *cert. denied,* 379 U.S. 900 (1964); *Continental Oil Company v. United States,* 330 F. 2d 347 (9th Cir. 1964); *Steccone v. Morse-Starrett Products Co.,* 171 F. 2d 197 (9th Cir. 1951); *Shapiro v. Bonanza Hotel Co.,* 185 F. 2d 777 (9th Cir. 1950); *Hartley Pen Co. v. United States District Court,* 287 F. 2d 324 (9th Cir. 1961).

Conclusion.

For the foregoing reasons, the order requiring simultaneous trials should be reversed and an order of this Court should be issued directing Judge Pence to vacate that order.

Respectfully submitted,

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Dated: February 15, 1968.

Certificate.

I certify that, in the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

George W. Jansen